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IN THE

Supreme Court of the United States

OCTOBER TERM, 1953

WHEATLAND ELECTRIC COOPERATIVE, INC., *Petitioner*

v.

NATIONAL LABOR RELATIONS BOARD

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT.

Wheatland Electric Cooperative, Inc., the Petitioner above named, prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Tenth Circuit entered in this case.

OPINIONS BELOW

The opinion of the National Labor Relations Board (R. 72-75) is reported at 94 N.L.R.B. 109, and the opinion of the United States Court of Appeals for the Tenth Circuit (R. 505-511) is reported at 208 F. 2d 878.

JUDISDICTION

The decree enforcing the decision of the United States Court of Appeals for the Tenth Circuit was entered on February 10, 1954 (R. 512). The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

1. Whether there was sufficient evidence on the record considered as a whole to support the finding of the Court of Appeals that the Petitioner had failed to bargain in good faith in violation of Sections 8 (a) (1) and 8 (a) (5) of the National Labor Relations Act as amended, 29 U.S.C. Secs. 151 et seq.

2. Whether the National Labor Relations Board has jurisdiction over Petitioner under the provisions of the National Labor Relations Act as amended 29 U.S.C. Secs. 151 et seq.

STATUTES INVOLVED

The pertinent statutes are printed in the appendix, infra, pp. 17-18.

STATEMENT

Petitioner, Wheatland Electric Cooperative, Inc., is a non-profit, rural, electrical cooperative organized under the Laws of the State of Kansas and in conformity with the rules and regulations of the Rural Electrification Administration. It generates, transmits and distributes electrical energy primarily to farmers residing in the Kansas counties of Wichita, Greeley, Kearney, Scott

and Hamilton. It is the sole source of electrical energy for this certificated area (R. 11, 12, 77, 79, 80). Management on a policy level is carried out by a Board of nine trustees; all of whom are members of the Cooperative and are farmers residing in scattered portions of Petitioner's certificated area (R. 329-330). Management as to details is carried out by a Manager, an Attorney and such supervisors as are retained by the Board of Trustees (R. 231). Petitioner employs thirty-eight employees, nineteen of whom are line men and operators, the balance being clerical and supervisory personnel R. 13).

At a meeting held the night of January 11, 1953, under the auspices of M. V. Johnson, Assistant International Representative, International Union of Operating Engineers, A. F. of L., certain of Petitioner's employees expressed a desire to be represented by Johnson's Union. Mr. Frank C. Arthur, Petitioner's Manager, was so advised of this fact by Johnson on January 12, 1951. To Johnson's statement that the employees were desirous of recognition by Petitioner, Arthur expressed complete ignorance of and a lack of experience in Labor Relations matters, and referred him to Mr. P. C. Frazee, Petitioner's Attorney (R. 106-107). The following day Johnson without consulting or notifying Frazee, filed a petition for certification with the Labor Board in which he alleged that he had received no reply to his request for recognition. He then advised Frazee by letter on the same day that the Petition had been filed (R. 5, 6, 334-335).

Subsequently a conference was held between the Union

Representatives and Petitioner under the direction of a Field Examiner for the Board. At this Conference the question of whether or not Petitioner was engaged in Interstate Commerce arose and the Examiner advised that the question be resolved by a hearing which was subsequently held on March 2, 1951 (R. 336-337).

By order entered on April 30, 1951, it was determined that Petitioner was engaged in Interstate Commerce and an order for an election was issued (R. 110-111, 6-7). A dispute then arose as to the exact members to be included in the bargaining unit because of indefinite language used in the Board's order. Nevertheless, an election was held on June 1, 1951 and the results thereof (fourteen for the Union, three against) were certified to Petitioner by the Board on June 11, 1951 (R. 339, 111, 400-401).

After the election, the dispute concerning the composition of the bargaining unit continued, and a meeting between the Union and Petitioner was arranged for June 22, on June 14, 1951, by Arthur and Johnson (R. 456). Johnson then filed an Unfair Labor Practice charge against Petitioner on June 18, 1951 (R. 113-114, 456). A meeting was then held in Wichita, Kansas, on July 13, 1951 under the direction of a Field Examiner of the Board to attempt to resolve the question. At that time, the Company indicated a desire to bargain and Johnson in order to hold an election on Union Security decided to withdraw the charge (R. 340-341). Johnson thereupon delivered his proposed contracts to Petitioner's Representatives and designated his bargaining committee.

Later, the first meeting for negotiation was set for July 23, 1951 (R. 145-155, 341-343).

On the evening of July 18, 1951, the employees of Petitioner being dissatisfied with Johnson's progress threatened to strike, but Johnson managed to disuade them (R. 150).

A meeting of the negotiators was held on July 23, 1951 at Frazee's office in Syracuse, Kansas, attended by Frazee and Mr. Frank E. Crouch, Vice President and member of the Board of Trustees for Petitioner and Johnson, Mr. Clark, and Mr. Adams for the Union; Mr. McGonigle, the other Union negotiator being absent (R. 344, 116, 154-155). The meeting lasted four and one-half hours during which considerable progress was made and so admitted by the Union Representatives. The next meeting was scheduled at that time for August 14, 1951, at which the entire Board of Trustees of Petitioner would attend (R. 344-352, 155-159). At this meeting it became apparent, after some discussion, that the group was too unwieldy for proper negotiation and the meeting was accordingly recessed until the following day (R. 159-161, 352-354). Johnson, Gregory and McGonigle appeared for the Union, Adams and Clark being absent (R. 353). Negotiations were resumed on August 15, with considerable discussion of parts of the contract by Frazee and Crouch for Petitioner and Johnson, McGonigle and Gregory for the Union, Adams and Clark being absent (R. 356-357). The next meeting proposed at that time by Petitioner, was for August 23rd, which was the annual meeting of the Cooperative members and of the Board

of Trustees. Johnson was offered a chance to appear on the program and outline the Union's proposals and the negotiators were invited to the Trustee's meeting for further negotiation of the contract. Johnson refused to appear and no Union negotiator appeared at the Trustee's meeting (R. 358-359, 163-165).

On the evening of August 15, 1951, Johnson by letter called on the services of the Federal Mediation and Conciliation Commission in Kansas City, Missouri, stating that no agreement had been reached between Petitioner and the Union and requested help. This communication was received by Petitioner on the 25th or 26th of August, and possible dates for meetings were proposed by Petitioner and the Commissioner for August 28, 29 and/or September 11. None of the dates were satisfactory to all parties because of prior commitments. The last date, September 11, 1951, was unsatisfactory because of the required attendance of Frazee and Arthur at a Corporation Commission hearing of the State of Kansas in Topeka (R. 165-169, 359-362).

Shortly after midnight on September 12, 1951, after considerable discussion, eight of the fourteen Union employees went on strike and shut down the only generating facilities of Petitioner then operating in Scott City (R. 111, 224-225). A picket line was set up shortly thereafter and maintained around Petitioner's two Scott City generating Plants until September 22, 1951, at which time the strike was abandoned and the strikers offered to return to work (R. 229). The shut-down cut off the supplying of all electrical energy to Scott City, Kansas, and the surrounding rural area including the local hos-

pital which had no emergency generating facilities (R. 79, 224-227, 445-447). The shut-down was discovered by Petitioner's supervisory personnel shortly after it was completed and an attempt was made to restore the Plant to service (R. 224-227). Petitioner's Office Manager, William Geis, interrogated Clark, the spokesman of the strikers, as to their demands, and Clark replied that they wished to talk to the whole Board of Trustees or to Mr. Taylor, the President. Mr. Arthur called from Kansas City and asked to talk to Clark concerning the matter, but Clark refused. It was also explained to Clark the difficulty attendant with calling a meeting of the Board of Trustees because of the travel distances involved (R. 432-436). Geis told Clark, however, that he would get the Board together by noon if possible and proceeded to notify the Board (R. 437). The Board of Trustees convened around 2:00 P. M. on September 12, 1951 and remained in session until around 7:30 P. M., but no Union Representative appeared (R. 421-422, 437). No attempt having been made by the Union to negotiate with Petitioner as requested by the strikers, separation certificates were distributed to the strikers on September 13 and 14 with the notation thereon that the strikers had quit (R. 368, 94-97, 462-465). A meeting was then arranged and held with the Federal Mediation Commissioner on September 14. The Commissioner met with the Board of Trustees of Petitioner and then met with the Union group separately. Before leaving the Trustees meeting he stated that in his opinion the Union was in the wrong and that he would recommend an immediate termination of the strike and a return to work, which

was acceptable to Petitioner. After meeting with the Union group, he returned and stated that the Strikers refused to return to work (R. 362-364). Petitioner then proceeded to hire replacements for the strikers, beginning on September 18, 1951 (R. 427). On September 22nd a meeting was held with the Federal Mediation Commission at which time the Union Representatives offered to return the strikers to work. No discussion of the contract was held as the Commissioner and Petitioner's representatives were in doubt as to whether or not the Union still represented a majority of the employees, and the Commissioner instructed Frazee to consult with Mr. Sperry, the director of the Seventeenth Regional Office of the National Labor Relations Board at Kansas City, Missouri, in regard to the question before negotiating further (R. 365-366). The charge out of which the present cause arose was then filed on October 3, 1951 (R. 182). A hearing was then held on the charge on October 16, 1951 (R. 372). As a result of this meeting, and after consultation with Mr. Sperry in regard to the question of certification, Petitioner proposed a meeting with the Union Committee for negotiation on October 17, 1951, but this date was unacceptable to the Union representative. A bargaining meeting was finally arranged for and held on November 8, 1951; at which time considerable progress was made on the contract, and the Mediation Commissioner felt that his services would no longer be necessary (R. 369-370, 372-373, 408-419). No negotiations have been requested by either party or held since this time (R. 137) with the complaint in this cause being filed on February 15, 1952 (R. 29-33).

Upon the hearing the Board found that Petitioner had failed to bargain in good faith with the Union in violation of Secs. 8 (a) (1) and 8 (a) (5) of the Act, and found that the discharge of the strikers and the refusal to reinstate them was also in violation of Secs. 8 (a) (1) and 8 (a) (3) of the Act. The Board thereupon ordered Petitioner to reinstate the discharged strikers discharging any replacements necessary, and to provide them with back pay from September 22, 1951, and further to proceed to bargain in good faith with the Union (R. 72-75).

Petitioner asked for a review of the Board's order by the United States Court of Appeals for the Tenth Circuit and the National Relations Board asked for enforcement of its order. The Court decreed the enforcement of the Board's order (R. 512-516).

SPECIFICATION OF ERROR TO BE URGED

1. The United States Court of Appeals for the Tenth Circuit erred in holding that Petitioner had failed to bargain in good faith with the Union in violation of Sections 8 (a) (1) and 8 (a) (5) of the National Labor Relations Act as amended.

2. The National Labor Relations Board and hence the United States Court of Appeals for the Tenth Circuit has no jurisdiction over Petitioner under the provisions of the National Labor Relations Act as amended.

REASONS FOR GRANTING THE WRIT

1. The decision of the Court of Appeals in finding that Petitioner had failed to bargain in good faith with

the Union in violation of Sections 8 (a) 1() and 8 (a) (5) of the National Labor Relations Act as amended places great reliance and emphasis on primarily only two features of the record: (a) Statements made by Petitioner's negotiators which might represent anti-union bias but were non coercive, and (b) Petitioner's grant of a unilateral wage increase to the employees after the strike terminated. The Court's opinion can therefore, as concerns (a), be said to be in conflict with the decision of the United States Court of Appeals for the Sixth Circuit in the case of Pittsburg Steamship Co., v. National Labor Relations Board (CA-6, 1950) 180 F. 2d. 731; and also to be contrary to the mandate of Section 8 (c) of the National Labor Relations Act as amended, and as to (b) to be in conflict with the decision of the United States Court of Appeals for the Seventh Circuit in National Labor Relations Board v. Bradley Washfountain Co., (CA-7, 1951) 192 F. 2d 144.

(a) The Court of Appeals gave great emphasis to the fact that Petitioner's Attorney during the negotiations had read to the Union representatives an article from the United States News and World Report concerning high wages paid Union Officials as a background element indicating a lack of willingness to bargain in good faith with the Union (R. 510). No finding was made that this statement tended to be coercive, nor did the Labor Board at any time so contend. Section 8 (c) of the National Labor Relations Act as amended specifically condemns this practice by declaring,

"the expressing of any views, argument or opinion,

> or the dissemination thereof whether in written, printed, graphic or visual form shall not constitute or be evidence of an unfair Labor practice under any of the provisions if such expression contains no threat of reprisal or force, or promise of benefit."

The Court of Appeals for the Sixth Circuit in the case of Pittsburg Steamship Co., v. National Labor Relations Board, cited Supra. also specifically condemned this practice in a case in which the Board had used anti-union statements made to an employee as evidence in finding that the employee had been discharged because of Union activities. In commenting on this issue the Court had this to say, at Page 735:

> "With reference to the right of free speech the legislative history shows that the amendment embodied in Sec. 8 (c) of the Taft-Hartley Act was specifically intended to prevent the Board from using unrelated non-coercive expressions of opinion on union matters as evidence of a general course of unfair labor conduct."

It would seem therefore that in the absence of a finding by the Court of Appeals that the statements cited by it were coercive in nature, that the decision is in conflict with the decision of the Court of Appeals for the Sixth Circuit, and is further contrary to the mandate of Section 8 (c) of the National Labor Relations Act as amended.

(b) The Court of Appeals further considered the fact of the unilateral grant of a wage increase as demon-

strating a bad faith attitude on the part of Petitioner without a further finding of an undermining of the representative status and prestige of the bargaining agent by such conduct in conflict with the decision of the Court of Appeals for the Seventh Circuit in National Labor Relations Board v. Bradley Washfountain Co., Cited Supra, and also contrary to the rule established by this Court in National Labor Relations Board v. Crompton-Highland Mills, Inc., 337 U. S. 217, 69 S. Ct. 960, 93 L. Ed. 1320, (1949). The rule established by the foregoing cases is that a unilateral wage increase in and of itself is not necessarily iniquitous and only becomes so if in the particular case it tends to undermine the representative status and prestige of the bargaining agent, and therefore should not be used as evidence of bad faith on the part of the company without such a finding. The Court of Appeals in the instant case appears to hold however that any unilateral wage increase, regardless of the surrounding circumstances, tends to undermine the representative status and prestige of the bargaining unit and is therefore evidence of bad faith. This holding clearly is in conflict with the decision of the Court of Appeals for the Seventh Circuit and the decision of this Court.

2. Petitioner, even though the issue was not raised before the Court of Appeals and was not strenuously urged before the Labor Board, feels that the Court should grant certiorari to consider the question of the jurisdiction of the National Labor Relations Board over Petitioner and over other similar cooperatives. It is

believed that this matter is of such great importance, because of recent expressions of the National Labor Relations Board, that the question should be reconsidered and perhaps a new jurisdictional formula be set out by the Court.

Historically, contentions that the National Labor Relations Board had no jurisdiction over rural electric cooperatives, have met with little, if any, success, because of the application of the rule of *de minimus*. The decision of this Court in the case of Amalgamated Association of Street, Electric Railway and Motor Coach Employees of America, Division 988, et al. v. Wisconsin Employment Relations Board, 340 U. S. 383, (1951) has been considered broad enough in the past to include Petitioner and practically all other similar cooperatives.

Recently, however, on October 28, 1953 after briefs had been filed in the instant case with the Court of Appeals and the case had been set for argument on November 9, 1953, the National Labor Relations Board in the case of Inter-County Rural Electric Cooperative, 106 N.L.R.B. 238, decided to refuse to take jurisdiction over a labor dispute involving a rural electric cooperative practically identical in size and composition to Petitioner (See R. 11-27). The Board's opinion was based on the fact that it did not feel that the cooperative's operations had a sufficient impact upon Interstate Commerce to justify taking jurisdiction even though if, as pointed out in the dissenting opinion, the rule of *de minimus* had been applied, the Board would have been compelled to take jurisdiction.

Again in the case of Coles-Moultrie Electric Cooperative, 107 N.L.R.B. 18 decided on November 10, 1953, the Board refused to assume jurisdiction over another rural electric cooperative quite similar to Petitioner, giving again as its reason that it did not feel that the cooperative's operations had a sufficient impact on commerce to justify its taking jurisdiction. No indication is given in either opinion as to why the rule of *de minimus* was not followed. It is submitted, however, that the basis of these decisions can be found in the declaration of policy of the National Labor Management Relations Act of 1947 in Sec. 1 (b), which states in part:

> "It is the purpose and policy of this Act, in order to promote the full flow of commerce, to prescribe the legitimate rights of both employees and employers in their relations affecting commerce, to provide orderly and peaceful procedures for preventing the interference by either with the legtimate rights of the other, to protect the rights of individual employees in their relations with labor organizations whose activities affect commerce to define and prescribe practices on the part of labor and management which effect commerce and are inimical to the general welfare, and to protect the rights of the public in connection with labor disputes affecting commerce."

The above quoted policy would seem to be based on the desire of Congress to promote the full flow of commerce in the U. S., and certainly no other basis could constitutionally be permitted. The present Chairman

of the National Labor Relations Board in a speech given by him on October 21, 1953 and reported in N.L.R.B. Release R-428 seemed to have this policy of Congress clearly in mind. After reporting that in the fiscal year 1953 the Board received a total of more than 14,000 cases, and in that same period rendered formal decisions in 3,334 cases, representing an average of thirteen decisions per day, he stated as follows:

> "These figures may lead you to wonder whether there were 14,000 labor disputes in 1953 which had so substantial an effect on interstate commerce and the national economy to require the attention of the Federal Government. I do not think so. Many of these involved small establishments essentially local in character which were, nevertheless, technically under the statute and which were covered by the Board's jurisdictional plan. 1,456 of the total number of cases filed in 1953 involved retail establishments alone. A very large portion of the cases filed involved businesses which employed fewer than 20 employees."

The decisions of this Court, however, particularly that of the Amalgamated Association cited Supra., under the *de minimus* rule would probably require the Board to continue to consider a similar case load with a large proportion of the cases involving small retail establishments and small local companies with few employees, none of which could under any practical consideration actually affect "the full flow of commerce." Certainly no administrative body, no matter how large or complex,

can be expected properly to analyze and dispense justice to those disputes vitally affecting commerce if it must continually be plagued by thousands of small cases arising from disputes with small local concerns having no real effect on commerce. It is inconceivable that Congress in drafting the above quoted policy ever intended that the functions of the National Labor Relations Board should be so broad.

It is, therefore, earnestly urged by Petitioner that a Writ of Certiorari should be issued in this cause in order to permit reconsideration of the entire question of the jurisdictional powers of the National Labor Relations Board in the light of the practical operation of the Board and the expressed intent of Congress for the purpose of formulating a new rule so as, in the words of its Chairman, to permit the National Labor Relations Board "to make decisions which are in harmony with common sense reality and the plain and simple facts of everyday life."[1]

CONCLUSION

For the foregoing reasons it is respectfully submitted that this petition for a Writ of Certiorari should be granted.

David P. Strickler,

Colorado Springs, Colorado,

Attorney for Petitioner.

March 24, 1954.

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[1] NLRB Release R-428.

APPENDIX

National Labor Relations Act, as amended (61 Stat. 136, 29 U. S. C. Secs. 151 et. seq.)

Sec. 1 (b).

"Industrial strife which interferes with the normal flow of commerce and with the full production of articles and commodities for commerce, can be avoided or substantially minimized if employers, employees, and labor organizations each recognize under law one another's legitimate rights in their relations with each other, and above all recognize under law that neither party has any right in its relations with any other to engage in acts or practices which jeopardize the public health, safety, or interest.

It is the purpose and policy of this Act, in order to promote the full flow of commerce, to prescribe the legitimate rights of both employees and employer in their relations affecting commerce, to provide orderly and peaceful procedures for preventing the interference by either with the legitimate rights of the other, to protect the right of individual employees in their relations with labor organizations whose activities affect commerce, to define and prescribed practices on the part of labor and management which affect commerce and are inimical to the general welfare, and to protect the rights of the public in connection with labor disputes affecting commerce."

Sec. 8 (a) (1).

"It shall be an unfair labor practice for an employer —to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 7."

Sec. 8 (a) (5).

"It shall be an unfair labor practice for an employer —to refuse to bargain collectively with the representatives of his employees, subject to the provisions of Section 9 (a)."

Sec. 8 (c).

"The expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this Act, if such expression contains no threat of reprisal or force or promise of benefit."

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In the Supreme Court of the United States

OCTOBER TERM, 1953

No. 658

WHEATLAND ELECTRIC COOPERATIVE, INC.,
PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court below (R. 505–511) is reported at 208 F. 2d 878. The findings of fact, conclusions of law, and order of the National Labor Relations Board (R. 72–75) are reported at 102 NLRB 1119.

JURISDICTION

The decree of the court below was entered on February 10, 1954 (R. 512–516). The petition for a writ of certiorari was filed on March 26,

1954. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

STATUTE INVOLVED

The pertinent provisions of the National Labor Relations Act, as amended (61 Stat. 136, 29 U. S. C., Supp. V, 151, *et seq.*), are set forth in the Appendix, *infra,* pp. 18–21.

QUESTIONS PRESENTED

1. Whether the Board's findings are supported by substantial evidence on the record as a whole.

2. Whether the Board's assertion of jurisdiction in this case, admittedly authorized under prior decisions of this Court, was erroneous.[1]

STATEMENT

I

THE BOARD'S FINDINGS AND CONCLUSIONS OF LAW

The Board found that petitioner was engaged in commerce within the meaning of the Act and that it had violated Section 8 (a) (1), (3) and (5) of the National Labor Relations Act by refusing to bargain with the certified union and by refusing to reinstate eight employees who had engaged in a strike. The subsidiary facts upon which these findings are based may be summarized as follows:

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[1] This question, as petitioner acknowledges (Pet. 12), was neither raised nor considered in the court below.

A. THE BUSINESS OF PETITIONER

Petitioner, a Kansas cooperative corporation with its principal place of business at Scott City, Kansas, is engaged in the production and distribution of electric power to its approximately 4,200 members located in five counties in the State of Kansas and the city of Towner, Colorado (R. 35–36; 11–20, 79–82, 259).[2] In addition to furnishing electricity to its members, it furnishes electrical power to various business enterprises located in Kansas and Colorado, including a smaller Kansas electrical cooperative, telephone companies, the Santa Fe and Missouri Pacific Railroads, the National Sugar Refining Company, the Shallow Water Refining Company, retail stores, restaurants, grain elevators, motion picture theatres, etc. (R. 35–36; 12–14, 80–82, 259). Petitioner owns and operates four generating plants, two in Scott City, one in Leoti, and another in Syracuse, all in the State of Kansas (R. 16, 77–79). The newest of these plants, including 900 miles of power lines, was built at a cost of a million and a half dollars, with materials shipped largely from points outside the State of Kansas (R. 35–36; 15). Miscellaneous supplies used by petitioner are in part shipped from outside of Kansas (R. 35, 36; 15). Petitioner's revenue

[2] Whenever, in a series of references, a semicolon appears, the references preceding it are to the Board's findings; those following are to the supporting evidence. Occasional references to the transcript are designated "Tr."

from the sale of electrical power exceeded $382,000 in 1950 and $470,000 in 1951 (R. 35–36; 17, 94).

Upon the foregoing facts, the Board found that petitioner's operations affected interstate commerce within the meaning of the Act and that it would effectuate the policies of the Act to exercise its jurisdiction in the instant case (R. 35–36, 73).

B. THE UNFAIR LABOR PRACTICES

1. *The bargaining negotiations.*—On July 11, 1951, the Board, following an election among petitioner's employees at its Scott City and Syracuse plants, certified the Operating Engineers Union, A. F. L., as the bargaining representative of the employees in an appropriate unit (R. 37; 111).

The day after the election, June 2, Union Representative Johnson wrote petitioner's manager, Arthur, and asked him to meet with the Union to negotiate a contract (R. 37; 112). Arthur refused to discuss a contract, stating that he would not bargain unless it was determined that employee Halfman, the warehouse clerk and storekeeper, and employee Robertson, a "meter repairman," should be excluded from the appropriate unit (R. 39, 40; 113, 114).[3]

[3] The Board's unit finding in the representation proceeding had specifically included Halfman, as the "clerk in the warehouse," within the unit (94 NLRB at 110). As to Robertson, petitioner claimed he was a supervisor. The Board in the unfair labor practice proceeding found that he was not (R. 38, 39).

Johnson immediately filed a charge with the Board complaining that petitioner was refusing to bargain with the Union (R. 114). Thereafter, on July 13, Johnson agreed to withdraw the charge in return for petitioner's promise (by Attorney Frazee and Manager Arthur) to fulfill its bargaining obligation (R. 40; 114, 150, 375, 376). At this time, the Union submitted its proposed contract to Frazee and Arthur, and within a few days the unfair labor practice charge was withdrawn (R. 40; 114–117, 376, 402).

A bargaining conference was held in Syracuse 10 days later, July 23. Union Representative Johnson and employees Clint Clark and Red Adams represented the Union; Frazee, petitioner's attorney, and Frank Crouch, vice president and member of petitioner's Board of Directors, appeared for petitioner (R. 40; 116, 154, 200, 351). Though he had had the Union's contract proposals in his possession for over a week, Frazee had not read them (R. 40; 116, 117, 378). Furthermore, both he and Crouch stated that they had no authority to enter into any agreement binding the Company and could speak only as individuals (R. 40; 117, 202, 203, 210). Manager Arthur, who testified that he had been prepared to discuss the Union's suggestions and make counterproposals, did not come to the meeting (R. 403, 427). The meeting, lasting three or four hours (R. 200, 201, 215), was spent in reading and becoming familiar with the Union's draft and in

the discussion and tentative adoption of minor changes (R. 40, 41; 116, 117, 155–156, 201–215, 469–481).

Avoiding an earlier meeting (R. 117, 118), petitioner did not meet with the Union until three weeks later, when, at Frazee's invitation, Union representatives met with petitioner's nine-member Board of Trustees at their regular monthly meeting on August 14 (R. 40, 41; 117). The Union's representative, Johnson, and employees McGonigle, Harry Messenger, and Floyd Gregory were kept waiting for about three hours (R. 118, 119). They were then admitted to the meeting at which Manager Arthur, Attorney Frazee, and about eight Trustees were present (R. 40, 41; 119, 293, 294, 352, 353). The Trustees had not read or discussed the Union's proposals before the meeting; accordingly, the two and a half hours (R. 119, 121) spent in the conference were used to familiarize them with the Union's suggestions and in summarizing the July 13 discussion (R. 40, 41; 119, 120, 294, 295, 427). Manager Arthur renewed the controversy over the status of Halfman and Robertson, and continued to press it even after Frazee, his attorney, advised that Halfman had been specifically included by the Board within the unit (R. 41; 119, 120, 294–296, 394, Tr. 1086). The Trustees also stated that all employees should be free to bargain individually and directly with the management, rather than through the Union, on working conditions

and wages (R. 40; 121). The meeting ended without accomplishment (R. 40, 41; 295, 353, 427). Frazee acknowledged that the August 14 meeting was much too large for negotiation purposes (R. 353).

The Trustees appointed Manager Arthur and Attorney Frazee to meet the following day in Syracuse with Union Representative Johnson and employees Gregory and McGonigle (R. 40, 41; 297, 299, 300, 319, 323, 354). Arthur failed to show up (R. 405). Vice President Crouch appeared instead, and while he took part in the meeting, Crouch made it clear that he could give only his personal views and that the Trustees in fact disagreed with him on most issues (R. 122, 123, 355, 356).

At the August 15 conference, petitioner's officials reviewed the Union's proposed contract anew as if no previous discussions of it had taken place (R. 41; 122, 161, 162, 356). They evinced little disposition to reach an agreement. At one point Frazee remarked, "all I am obligated to do is to meet with you" (R. 41; 122); at another, Crouch advised employee Gregory that if he didn't like his job he should quit (R. 51; 299); and Frazee read aloud an article on high-paid union officials from a July 20, 1951, copy of *U. S. News and World Report* (R. 45; 195, 196, 382, 383). As the meeting ended Frazee remarked to the Union's representative, "Now, any

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time you want to call on me, why, I will work you in here when I am in town" (R. 124, 300). The meeting lasted less than 2 hours (R. 353, 357), and Frazee testified that only two features of the Union's contract proposal were really discussed that day (R. 357), petitioner again injecting the status of Halfman and Robertson into the discussions (R. 5; 129, 130).

By the end of the August 15 session, no final agreement on any point had been reached (R. 41, 42; 119–125, 300, 301). Indeed, practically nothing was added by the August 14 and 15 discussions to whatever bargaining progress had been made at the July 23 meeting (R. 357, 427). As matters stood, the Union had made concessions on eight points while the petitioner had neither accepted nor made counterproposals on the remaining Union proposals (R. 41–42; 155, 204–214, 296, 311, 312, 315, 317, 345, 356–357, 415, 417, 471, 473, 477). On some of the latter the Union was unable to elicit even an expression of management's attitude (R. 42; 207, 212–216).

The only concrete suggestion made by petitioner was Frazee's statement at the July 27 meeting that the Company planned to substitute a 40-hour week for the 48-hour week then in effect without reduction in pay (R. 41; 122, 123). This suggestion was retracted when Union Representative Johnson advised that it would violate regulations of the Wage Stabilization Board (R. 41; 123, 124). No agreement was reached on Halfman

and Robertson (R. 39; 312, 313). Petitioner's officials at all times refused to discuss any provision for union security (R. 208, 379, 418). Frazee promised to submit counterproposals to the Union, but at the time of the hearing none had ever been received (R. 41; 122, 123, 125). Finally, the August meetings showed that even the tentative agreements reached at the July meeting were not accepted by petitioner as final or in any way binding (R. 40, 41; 122, 123).

On August 15, Frazee invited Union Representative Johnson to address a meeting of petitioner's membership to be held the next week. Johnson refused, believing that nothing constructive could be accomplished at so large a gathering (R. 41; 185–187, 358, 359, 381, 382).

Petitioner's officials would not commit themselves to another meeting date (R. 40; 125). Despairing of success through his personal efforts, Johnson asked for help from the Federal Mediation and Conciliation Service. The efforts of the Service to set up conferences on August 29 and September 11 failed because petitioner's representatives were not available (R. 40; 125–127, 166–170, 359–361, 484, 485).

2. *The strike and petitioner's refusal to reinstate the strikers.*—By September 11, union members of petitioner's Scott City plant were convinced that petitioner was stalling; in a meeting held that day they voted to strike in protest

against petitioner's refusal to bargain in good faith (R. 43; 127, 128, 219–221, 266, 275, 279, 302, 303, 403).

The strike began shortly after midnight on September 12, and continued until September 22 (R. 42; 220, 221, 224, 225, 226, 278, 290, 303). Within six hours after commencement of the strike petitioner, using employees from other areas and professional and supervisory employees, had put the newly built Jess Taylor plant as well as the old Scott City plant into operation, and electrical service to the area continued in spite of the strike (R. 282, 437, 442, 443). The eight strikers engaged in peaceful picketing of the Scott City plant throughout the time of the strike and in some picketing of the Jess Taylor plant (R. 43; 131, 229, 230, 276, 281, 291, 303, 449, 451).

On September 13, the second day of the strike, the eight strikers were discharged (R. 428, 429). Manager Arthur handed discharge notices and final pay checks to each of the eight strikers as they appeared on the picket line on September 13 and 14 (R. 43; 96, 97, 267, 275, 278, 280, 290, 304).

Starting on September 18, following their discharge, the strikers were replaced by new or promoted employees (R. 46; 86–88, 90, 91); new linemen were hired at $1.38 an hour as compared to the old rate of $1.10 and $1.25 (R. 46; 83, 86, 87), and employees hired to replace the operators

were hired at $1.29 an hour as compared to the old rate of $1.10 (R. 46; 90, 91).

Throughout the strike, efforts to end it were made by union and company representatives and by the Federal Mediation and Conciliation Service (R. 43; 131–135, 189–192, 405–407). On September 22, International Union Representative Canny, by telephone and letter, notified Arthur of the strikers' unconditional offer to return to work (R. 43, 47; 134, 135, 191–193, 468); Arthur rejected the offer, stating that he had all the employees he needed and "that is my final say right now" (R. 43; 192). Despite further efforts by union officials, a Board Field Examiner and the Conciliation Service, no agreement was reached (R. 43; 135–137), and at the time of the hearing none of the strikers had been reinstated (R. 37; 135, 235, 267–271, 276, 278, 280, 285, 288, 292).

C. THE BOARD'S CONCLUSIONS AND ORDER

Upon the facts summarized above the Board found that petitioner had failed to bargain in good faith with the Union, in violation of Section 8 (a) (1) and (5) of the Act; that the strike was caused by, and was in protest against, petitioner's refusal to bargain and was therefore an unfair labor practice strike; and that, whether or not the strike was an unfair labor practice strike at its inception, petitioner violated Section 8 (a) (1) and (3) of the Act by discharging eight employees for striking (R. 44–48, 54, 73).

Accordingly, the Board ordered petitioner to cease and desist from the unfair labor practices found, to bargain collectively with the Union upon request, to reinstate the eight discharged strikers with back pay, and to post appropriate notices (R. 73–75).

II

THE DECISION OF THE COURT BELOW

The court below held (R. 505–511) that the record amply sustained the Board's findings and conclusions that petitioner had refused to bargain in good faith; that the strike was called in protest against petitioner's refusal to bargain and was therefore an unfair labor practice strike; and that the strikers were, accordingly, entitled to reinstatement irrespective of whether their positions had been filled in the interim. The court enforced the Board's order in its entirety.

ARGUMENT

1. The evidence we have summarized compellingly sustains the Board's findings, approved by the court below. Petitioner's first question (Pet. 2), seeking further review of the evidence by this Court, obviously does not warrant certiorari.

In seeking to escape this conclusion, petitioner singles out for challenge two subsidiary findings which the Board and the court below took into consideration, together with all the other circumstances surrounding the bargaining negotiations, in assessing petitioner's good faith or lack of it.

The Board (R. 45, n. 9) and the court below (R. 510) noted, *inter alia,* that petitioner's attorney read to the union representatives at one of the bargaining conferences a magazine article concerning high salaries paid to union officials (*supra,* p. 7). The Board's trial examiner pointed out (R. 45, n. 9) that the injection of this extraneous matter into the negotiations was for the purpose of distracting the attention of the negotiators from their objective and that it constituted an additional bit of evidence reflecting petitioner's opposition "to the idea of collective bargaining" which the record otherwise conclusively established. Petitioner's contention (Pet. 10–11) that the Board's reliance upon the incident contravenes the requirement of Section 8(c) of the Act, because the article itself was free of any coercive overtones, manifestly presents in the context of this case no question warranting review by this Court. The short answer to the argument is that Section 8 (c) has no application, for neither the Board nor the court below relied upon the contents of the article as such as evidence of petitioner's bad faith, but rather upon petitioner's tactical use of it to disrupt the course of the negotiations and thereby forestall consummation of a collective bargaining agreement.[4]

[4] The trial examiner in so finding expressly stated (R. 45, n. 9) that insofar as petitioner purported to be expressing its views on the subject of the high salaries paid to union officials, it was acting within the permissible limits of free speech.

Petitioner's underlying assumption that the Board is precluded by Section 8 (c) from relying on non-coercive statements made in the course of bargaining negotiations to determine the good faith of the parties to the negotiations is patently without merit. Whether an employer has bargained in good faith or not "involves a finding of motive or state of mind which can only be inferred from circumstantial evidence" and "from the totality of the employer's conduct." *National Labor Relations Board* v. *Reed & Prince Mfg. Co.*, 205 F. 2d 131, 134, 139–140 (C. A. 1), certiorari denied, 346 U. S. 887. If, as petitioner assumes, Section 8 (c) excluded from consideration, as part of the "totality of the employer's conduct," statements made in the course of negotiations, on the ground that they contained neither threats of reprisal nor promises of benefits, the result would go far to nullify Section 8 (a) (5) of the Act. "Congress, in enacting Section 8 (c) could not have intended that result." *National Labor Relations Board* v. *Kropp Forge Co.*, 178 F. 2d 822, 829 (C. A. 7), certiorari denied, 340 U. S. 810. Necessarily, where "such statements form a part of a general pattern or course of conduct" prohibited by Section 8 (a) (5), they "must * * * be considered as a basis for a finding of unfair labor practice." *Id.* at 828–829. Cf. *International Brotherhood of Electrical Workers*

v. *National Labor Relations Board,* 341 U. S. 694, 700–704.[5]

Equally unsubstantial as a basis for certiorari is the further contention (Pet. 11–12) that the Board and the court below erred in considering, as additional evidence of petitioner's lack of good faith in the bargaining negotiations, petitioner's unilateral grant of increased wages to new employees hired to replace the strikers and old employees transferred to the strikers' jobs. In view of the fact that petitioner, during the negotiations before the strike, had avoided discussion of the wage section of the Union's proposed contract (R. 215, 216), the court below (R. 511), in agreement with the Board (R. 45–46, 72–73), properly concluded that petitioner's unilateral action constituted a "disparagement of the collective bargaining proceedings," in derogation of the Union's status (*National Labor Relations Board* v. *Crompton-Highland Mills, Inc.,* 337 U. S. 217, 224), and a further demonstration of its "bad faith toward its bargaining responsi-

[5] *Pittsburgh S. S. Co.* v. *National Labor Relations Board,* 180 F. 2d 731 (C. A. 6), affirmed, 340 U. S. 498, cited by petitioner, is not to the contrary. The Sixth Circuit's admonition against the use of "*unrelated* non-coercive expressions of opinion on union matters as evidence of a general course of unfair labor conduct" (emphasis supplied) can have no application to statements made, as here, in the course of the bargaining negotiations under scrutiny.

bilities" (*National Labor Relations Board* v. *Andrew Jergens Co.*, 175 F. 2d 130, 135, 136 (C. A. 9), certiorari denied, 338 U. S. 827, and cases there cited).

2. Acknowledging (Pet. 12) that "the issue was not raised before the Court of Appeals and was not strenuously urged before the Labor Board," petitioner nevertheless suggests this as an appropriate case in which "perhaps a new jurisdictional formula [should] be set out by the Court." Even apart from the tardiness of its presentation, the suggestion is without merit. For, as petitioner concedes (Pet. 13), the Board's assertion of jurisdiction in this case was clearly proper under controlling decisions of this Court.[6] And the proposal that the Court should at this late date narrow the scope of the Board's statutory powers is, we think, wholly misconceived; it should appropriately be addressed to "Congress rather than the courts." *National Labor Relations Board* v. *Swinerton*, 202 F. 2d 511, 516 (C. A. 9), certiorari denied, 346 U. S. 814.[7]

[6] *Consolidated Edison Co.* v. *National Labor Relations Board*, 305 U. S. 197; *Amalgamated Ass'n of Street, Electric Ry., etc., Employees* v. *Wisconsin Employment Relations Board*, 340 U. S. 383, 391.

[7] Although the Board in some recent decisions has declined to assert its statutory jurisdiction over rural electrical cooperatives which were essentially local and which, unlike petitioner, confined their operations to one state, the Board's action has been based upon considerations of policy and carries no suggestion of doubt as to the Board's statutory power over such enterprises. *Inter-County Rural Electric Cooper-*

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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ative Corporation, 106 NLRB No. 239; *Coles-Moultrie Electric Cooperative*, 107 NLRB No. 18; *Upshur Rural Electric Cooperative Corporation*, 107 NLRB No. 60.

APPENDIX

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 29 U. S. C., Supp. V, 151, *et seq.*), are as follows:

DEFINITIONS

SEC. 2. When used in this Act—

* * * * *

(6) The term "commerce" means trade, traffic, commerce, transportation, or communication among the several States, or between the District of Columbia or any Territory of the United States and any State or other Territory, or between any foreign country and any State, Territory, or the District of Columbia, or within the District of Columbia or any Territory, or between points in the same State but through any other State or any Territory or the District of Columbia or any foreign country.

(7) The term "affecting commerce" means in commerce, or burdening or obstructing commerce or the free flow of commerce, or having led or tending to lead to a labor dispute burdening or obstructing commerce or the free flow of commerce.

* * * * *

RIGHTS OF EMPLOYEES

SEC. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted ac-

tivities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8 (a) (3).

UNFAIR LABOR PRACTICES

SEC. 8. (a) It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

* * * * *

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: * * *

* * * * *

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9 (a).

* * * * *

(c) The expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this Act, if such expression contains no threat of reprisal or force or promise of benefit.

* * * * *

PREVENTION OF UNFAIR LABOR PRACTICES

SEC. 10. (a) The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8) affecting commerce. This power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise. * * *

* * * * *

(c) * * * If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this Act: * * *

* * * * *

(e) The Board shall have power to petition any circuit court of appeals of the United States (including the United States Court of Appeals for the District of Columbia), or if all the circuit courts of appeals to which application may be made are in vacation, any district court of the United States (including the District Court of the United States for the District of Columbia), within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining

order, and shall certify and file in the court a transcript of the entire record in the proceedings, including the pleadings and testimony upon which such order was entered and the findings and order of the Board. Upon such filing, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter upon the pleadings, testimony, and proceedings set forth in such transcript a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its members, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. * * *

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